

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** September 30, 2016

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: L'Oreal W. Stepney, P.E., Deputy Director
Office of Water

Docket No.: 2016-0292-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 7, Memoranda of Understanding
MOU Between the Texas State Soil and Water Conservation Board and
TCEQ
Rule Project No. 2016-020-007-OW

Background and reason(s) for the rulemaking:

The Memorandum of Understanding (MOU) between the Texas State Soil and Water Conservation Board (TSSWCB) and Texas Commission on Environmental Quality (TCEQ) (30 Texas Administrative Code (TAC) §7.102) became effective on June 9, 1997. A Letter of Agreement (LOA) regarding inspections of dry poultry litter operations and complaint protocol for water quality complaints on animal feeding operations (AFOs) with a certified water quality management plan (WQMP) and dry poultry litter operations became effective on August 24, 2007. Changes to the MOU are necessary to reflect the TCEQ's current statutory name and the TSSWCB and TCEQ's current procedures for coordinating the jurisdictional authority, program responsibilities, procedural mechanisms for point and nonpoint source pollution programs, and to incorporate applicable conditions of the LOA into the MOU. Both agencies agreed to coordinate rulemaking to update the MOU.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

This rulemaking adopts the repeal of the current MOU in 30 TAC §7.102 and replaces it with an adoption by reference of the full text of the revised MOU at 31 TAC §523.5(b).

Representatives from the Water Quality Planning Division, Environmental Law Division, Office of Compliance and Enforcement Program Support Section, and Water Quality Division coordinated reviews and comments with the TSSWCB, and developed the MOU with the following changes:

- The TCEQ's statutory name was updated throughout the MOU.
- The TSSWCB's jurisdictional responsibility was updated throughout the MOU for consistency with the Texas Agriculture Code. The MOU states that the TSSWCB is the lead agency in the state for planning, management, and abatement of agricultural and silvicultural nonpoint source pollution.
- Provisions related to Federal Clean Water Act, §319(h) grant program for nonpoint source pollution were updated to accurately express how this program is currently awarded and administered. The TSSWCB and TCEQ are independently and directly

Re: Docket No. 2016-0292-RUL

awarded equal halves of this program and both agencies independently coordinate and administer the preparation of work projects under the grant. TCEQ is responsible for implementing the Texas Nonpoint Source Management Program for non-agricultural/silvicultural surface and ground water nonpoint source pollution.

- The MOU establishes that the TCEQ is responsible for the enforcement of all laws and regulations related to water and air quality, including both point and nonpoint sources, regardless of whether or not a facility has an approved WQMP.
- The MOU establishes that the TSSWCB is the lead agency and has primary responsibility for complaint investigations and compliance inspections on AFOs not required to obtain a water quality permit and on dry litter poultry concentrated animal feeding operations (CAFOs). The TSSWCB will investigate first odor complaints, where none have been received within the previous 12 months, at any dry litter poultry CAFO. Subsequent odor complaints at the same facility will be conducted by TCEQ.
- The MOU establishes that the TCEQ will respond to the second and all subsequent odor complaints for a rolling 12-month period at any dry litter poultry CAFO within 18 hours of complaint notification.
- The MOU requires both agencies to coordinate and cooperate with each other to establish protocols on activities related to complaint, inspection, and enforcement of non-permitted AFOs and dry litter poultry CAFOs.
- The MOU requires operations referred to the TCEQ by the TSSWCB be resolved prior to the TCEQ referring the operation back to the TSSWCB for WQMP development or investigation. A letter will serve as formal correspondence documenting the resolution of enforcement compliance issues.
- The MOU requires interagency meetings with regional office staff to be conducted on an annual basis to review and update the AFO and dry litter poultry CAFO complaint/referral process and to refine agency coordination procedures.
- The MOU requires the TSSWCB to provide TCEQ documentation of compliance inspection activities at dry litter poultry CAFOs on a quarterly basis.
- The MOU establishes that the TSSWCB can refer violations at AFOs and dry litter poultry CAFOs to TCEQ without decertifying the facility's WQMP.

B.) Scope required by federal regulations or state statutes:

No state statutes or federal regulations require revisions to this MOU.

C.) Additional staff recommendations that are not required by federal rule or state statute:

The MOU reorganizes and streamlines current procedures for coordinating the jurisdictional authority, program responsibilities, procedural mechanisms for point and nonpoint source pollution programs, and incorporates applicable conditions of the LOA into the MOU.

Statutory authority:

- Texas Water Code, §5.103 and §5.104(b)
- Texas Agriculture Code, §201.026

Re: Docket No. 2016-0292-RUL

Effect on the:

The MOU does not create a group of affected persons who were not affected previously. There is no fiscal impact.

A.) Regulated community:

The MOU affects the enforcement of laws and regulations related to water and air quality, including both point and nonpoint sources; typically the complaint, inspection, and enforcement of non-permitted AFOs and dry litter poultry operation CAFOs.

B.) Public:

The MOU does not directly affect the public.

C.) Agency programs:

The MOU affects the following agency programs:

- Water Quality Planning Division
 - NPS Team – implementation of the NPS Management Program
- Office of Compliance and Enforcement Program Support Section
 - Field Support Team – complaint response and coordination of air and water regional operation activities
- Water Quality Division
 - CAFO Permitting Team – review and approval of dry litter poultry facility odor control plans

Stakeholder meetings:

There were no stakeholder meetings held related to this rulemaking.

Public comment:

The commission held a public hearing on July 12, 2016. The comment period closed on July 15, 2016. The commission did not receive any comments on this rulemaking.

Significant changes from proposal:

No changes were made to the rulemaking from the proposal to adoption.

Potential controversial concerns and legislative interest:

The TSSWCB initiated rulemaking for 31 TAC §523.5 on November 19, 2015, and published for comment the proposal in the December 18, 2015, issue of the *Texas Register* (40 TexReg 9099). During the TSSWCB comment period no comments were received. On January 21, 2016, the TSSWCB adopted the amendment to 31 TAC §523.5, specifically adopting the MOU. The next step requires that the TCEQ go through the rulemaking process to revise 30 TAC §7.102 to adopt the MOU by reference.

Does this rulemaking affect any current policies or require development of new policies?

This rulemaking adopts the repeal of the current MOU in 30 TAC §7.102 and replaces it with an adoption by reference of the full text of the revised MOU at 31 TAC §523.5. The rulemaking does not affect any current policies or require development of new policies.

Re: Docket No. 2016-0292-RUL

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If this rule does not go forward the current MOU in 30 TAC §7.102 will remain in effect and will not reflect the revised MOU in 31 TAC §523.5(b).

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** June 10, 2016

Anticipated *Texas Register* adoption publication date: November 4, 2016

Anticipated effective date: November 10, 2016

Six-month *Texas Register* filing deadline: December 10, 2016

Agency contacts:

Kerry Niemann, Rule Project Manager, Water Quality Planning Division, (512) 239-0483

Bob Brush, Staff Attorney, (512) 239-5600

Derek Baxter, Texas Register Coordinator, (512) 239-2613

Attachments

31 TAC §523.5

Letter of Agreement between the TSSWCB and TCEQ for the Dry Litter Poultry Operations and Animal Feeding Operations

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Erin Chancellor
Stephen Tatum
Jim Rizk
Office of General Counsel
Kerry Niemann
Derek Baxter